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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 261

WILLIAM MILLER, PETITIONER,

vs.

H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JULY 26, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,392)

( )

SUPREME COURT OF THE UNITED STATES

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No.

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vs.

H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INDEX

	Original	Print
Proceedings in supreme court of Nebraska	1	1
Præcipe for transcript of record	1	1
Præcipe for appeal	3	2
Record from district court of Lancaster County	5	2
Petition	5	2
Journal entry	11	7
Answer	11	7
Reply	13	8
Journal entry	14	9
Injunction	15	9
Notice of appeal	17	10
Clerk's certificate (omitted in printing)	18	
Bill of exceptions	21	10
Motion for order settling bill of exceptions	22	10
Agreement of counsel	23	11

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	Original	Print
Testimony of Wm. H. Miller	24	11
Frank O'Connell	35	19
Wm. H. Miller, Jr	47	26
Frank O'Connell (recalled)	52	30
Argument of counsel	56	32
Order settling bill of exceptions	57	32
Certificates to bill of exceptions (omitted in printing)	58	
Brief of appellant (" " ")	59	
Brief of appellee (" " ")	60	
Argument and submission (" " ")	61	
Judgment	62	33
Opinion, Rose, J	63	34
Petition for rehearing and brief in support thereof (omitted in printing)	72	
Order denying rehearing	73	39
Clerk's certificate (omitted in printing)	74	
Order allowing certiorari		41

[fols. 1 & 2]

IN SUPREME COURT OF NEBRASKA

General Number 26612

WILLIAM MILLER, Appellee,

vs.

H. J. McLAUGHLIN, Secretary of the Department of Agriculture for the State of Nebraska, and Frank O'Connell, Chief Game Warden for the State of Nebraska, Appellants

PRÆCIPE FOR TRANSCRIPT

To the Clerk of said court:

Please prepare transcript for application for review to the Supreme Court of the United States, composed of the following:

1. The præcipe and entire transcript from the District Court for Lancaster County.
2. The entire bill of exceptions from the District Court for Lancaster County.
3. Briefs of both appellants and appellee.
4. Order of submission.
5. Judgment of the Supreme Court reversing the decision of said District Court.
6. Opinion of Supreme Court of Nebraska.
7. Motion for rehearing and brief in support thereof.
8. Judgment of above named court overruling said motion for rehearing.
9. Præcipe for transcript.

Seymour L. Smith, Attorney for Appellee.

Service of the above præcipe for record is hereby accepted and it is stipulated that said præcipe calls for all parts of the record necessary for review.

C. A. Sorenson, Attorney General, Attorney for Appellants, by Geo. W. Ayres.

[fols. 3 & 4] IN SUPREME COURT OF NEBRASKA

[Title omitted]

PRÆCIPE FOR APPEAL—Filed May 28, 1928

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 20th day of April, 1928, in a certain cause in the District Court of Lancaster County, wherein William H. Miller, Jr., was Plaintiff, and H. J. McLaughlin and Frank O'Connell were Defendants.

You will designate the above named H. J. McLaughlin and Frank O'Connell as Appellants, and William H. Miller, Jr., as Appellee.

O. S. Spillman and George W. Ayres, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 5] IN DISTRICT COURT FOR LANCASTER COUNTY, NEBRASKA

WILLIAM MILLER, Plaintiff,

vs.

H. J. McLAUGHLIN, First and Real Name Unknown, Secretary of the Department of Agriculture for the State of Nebraska, and Frank O'Connell, Chief Game Warden for the State of Nebraska, Defendants

PETITION—Filed Feb. 17, 1928

Comes now William Miller, plaintiff above named, who brings this action on behalf of himself and all other persons similarly situated, and alleges and says:

I

That he is a resident of the State of Nebraska and at all times herein mentioned was the owner and in possession of

certain nets, traps and seines used for the purpose of taking fish from the Missouri River, and said river only, and for no other purpose; that said Missouri River is a [fol. 6] navigable stream under the control of the government of the United States; that said river is a boundary stream between the State of Nebraska and the State of Iowa, the middle of the channel of said river being the exact boundary line between said states; that said nets, traps and seines were purchased by the plaintiff prior to the passage of the purported law hereinafter referred to, by such purchase he acquired, and has at all times since retained, a property right therein, and a property right to the use thereof.

II

That defendant, H. J. McLaughlin, is the duly qualified and acting Secretary of the Department of Argiculture of the State of Nebraska, and officially located at the State Capitol in Lancaster County, Nebraska; that defendant Frank O'Connell, is the duly qualified and acting Chief Game Warden for the State of Nebraska under said Department and officially located at the State Capitol in said County and State.

III

That on the 18th day of April, 1927, a purported law was approved by the Governor of the State of Nebraska, known as Chapter 126, of the Session Laws of Nebraska for 1927; Section 10 of which reads as follows:

"Section 10. Amendment.—That Section 7360, Compiled Statutes of Nebraska for 1922 be amended to read as follows:

7360. Department May Permit Netting and Seining.—In waters where white buffalo, suckers, garfish, carp or squaw fish abound, the department may remove or cause to be removed said coarse fish if said coarse fish are a detriment or menace to the propagation and increase of game fish in said waters, and may sell such coarse fish for the purpose [fol. 7] of defraying the expense of netting or seining. If there be any residue over the cost of netting or seining, the same shall be paid into the department of agriculture. In

case any fish of any of the varieties protected by law shall be taken in any seine or net as provided above, they shall be immediately returned alive by the person using the seine or net, to the waters from which they were taken. Minnow seines may be used as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended. No person shall take or attempt to take any fish except minnows from the waters within the State of Nebraska with nets, traps or seines. Carp, suckers, gars and buffalo fish may be taken with a spear during the months of March to November inclusive. The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps except as authorized by the Department of Agriculture shall — unlawful."

IV

That said Section 10 is null, void, and unconstitutional for the following reasons:

1. It violates Section 3, of Article I, of the Constitution of Nebraska which provides: "No person shall be deprived of life, liberty or property without due process of law."

2. It violates Section 21 of Article I of the Constitution of Nebraska which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

3. It violates Section 14 Article 3 of the Constitution of Nebraska which provides in part: "No bill shall contain more than one subject and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections, as amended, [fol. 8] and the section or sections so amended shall be repealed."

4. It violates Section 1 of Article 14, of the Constitution of the United States which provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

5. It violates Sections 1 and 2 of Article IV of the Constitution of the United States.

6. It violates Section 8 of Article I of the Constitution of the United States.

V

Plaintiff further alleges that the defendants and each of them from their said official location and in their official capacity respectively, are about to attempt to enforce and will enforce said purported law, especially that part of said Section 10, which attempts to make it unlawful to take fish from waters within the State of Nebraska with and to possess, nets, traps or seines, and deprive him of the rights of property in and to said seines, traps and nets, and use thereof, in violation of the Constitutions of Nebraska and of the United States, above referred to more specifically; that unless the defendants and each of them are temporarily, permanently and perpetually restrained and enjoined by this Court from in any manner enforcing or attempting to enforce said Section 10, plaintiff will be irreparably injured thereby.

VI

That the questions here involved are of common and general interest; that the persons similarly situated to plaintiff are very numerous and it is impracticable to bring them all before the Court; therefore, plaintiff brings this suit [fol. 9] for the benefit of said persons, as well as for himself; that each and all of the allegations and things relative to plaintiff in said petition contained, apply equally to said persons and each of them.

VII

That plaintiff has no adequate remedy at law; that if plaintiff proceeds and continues to exercise his property rights by keeping said nets, traps and seines in his possession, or of using same for the purpose of taking fish from said Missouri River, and nowhere else, he will be subject to a criminal prosecution and will be prosecuted; that a successful defense to said prosecution upon the grounds

herein set forth, would not prevent the defendants and each of them from subsequently causing his arrest and prosecution for each subsequent exercise of said rights; that unless this Court shall grant the prayer of this petition, plaintiff's right of property in and to said nets, traps and seines, will be impaired and destroyed, and he will be subjected to a multiplicity of suits, and subject to the embarrassment, inconvenience, and humiliation of criminal prosecutions all without authority of law; that nets, traps and seines are lawful objects of property; that at all times mentioned herein, the law of the State of Iowa permitted, and now permits fishing in the Missouri River with nets, traps and seines, as follows:

"Section 1747. Code of Iowa.—It shall be lawful for any person to take from the Mississippi or Missouri Rivers within the jurisdiction of the State, any fish with nets or seines upon procuring from the State Game Warden, an annual license for the use of such nets and seines."

That plaintiff plans to use and will use said nets, traps and seines, within the State of Iowa pursuant to its said law.

Wherefore, plaintiff prays that upon a hearing of said cause, Section 10, of Chap. 126, of the Session Laws of [fol. 10] Nebraska for 1927, be declared null, void and unconstitutional; that said defendants and each of them, and any agent, servant or officer employed in said Department, or working in conjunction with said Department of said Defendants, be temporarily, permanently, and perpetually restrained and enjoined from in any manner enforcing or attempting to enforce said Section 10, by interfering, arresting, detaining or hindering or causing to be interfered with, arrested, detained or hindered, plaintiff and those persons similarly situated, or either of them, first, because of the possession of said nets, traps and seines for use in said Missouri River within the State of Nebraska; second, because of possession of said nets, traps and seines for use in said Missouri River within the State of Iowa; third, because of the taking or attempting to take fish from said Missouri River within the State of Nebraska, with nets, traps or seines; fourth, because of the taking or attempt-

ing to take fish from said Missouri River within the State of Iowa with nets, traps or seines, and for such other and further relief as to this Court of Equity may seem just in the premises.

William Miller, by Seymour L. Smith, His Attorney.

Duly sworn to by William Miller. Jurat omitted in printing.

[fol. 11] [File endorsement omitted.]

In District Court of Lancaster County

Journal Entry—Feb. 21, 1928

Now on this day come the parties hereto by their attorneys and application for temporary injunction is argued and sustained by the Court.

Counsel to prepare order.

In District Court of Lancaster County

[Title omitted]

Answer—Filed March 28, 1928

[fol. 12] Come now the defendants above named and for answer to the petition of plaintiff say:

1. They admit the allegations of fact contained in paragraphs numbered II and III of the petition. They admit also that the plaintiff is a resident of the State of Nebraska; that he is the owner of certain nets, traps and seines used for the purpose of taking fish from the Missouri River and elsewhere in the State of Nebraska; that the Missouri River is a boundary stream between the State of Nebraska and the State of Iowa; that the middle of the channel of said river is the boundary line between said states and that each of the defendants in his official capacity is about to attempt to enforce the law which makes it unlawful to take any fish except minnows from any of the waters of the State of Nebraska by the use of nets or seines.

2. Each and every allegation of fact in said petition contained that has not been heretofore in this answer expressly admitted these answering defendants deny.

3. Further*ing* answering said petition the defendants say that the plaintiff has an adequate remedy at law in that he may show if he can in any proceedings brought by them or either of them to enforce said law either that the law is unconstitutional or that he has not violated its provisions.

Wherefore the defendants pray that plaintiff's cause of action against them may be dismissed at plaintiff's costs; that the temporary restraining order heretofore issued in this cause may be dissolved and that they may have such other and further relief as may be just and equitable.

H. J. McLaughlin and Frank O'Connell, Defendants, by O. S. Spillman and George W. Ayres, Their Attorneys.

[fol. 13] *Duly sworn to by Frank O'Connell. Jurat omitted in printing.*

[File endorsement omitted.]

In District Court of Lancaster County

[Title omitted]

Reply—Filed March 30, 1928

[fol. 14] Comes now the above named plaintiff and for his reply to the answer of the defendants and each of them filed herein, alleges and says as follows:

That he denies each and every allegation in said answer or answers contained, except which admits allegations of plaintiff's petition.

William Miller, by Seymour L. Smith, His Attorney.

Duly sworn to by William Miller. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 15] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

JOURNAL ENTRY—March 30, 1928

Now on this day come the parties hereto by their attorneys and this case now coming on for trial, evidence is adduced, arguments made and case submitted and taken under advisement by the Court.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

INJUNCTION—April 20, 1928

This cause coming on for hearing on the 30th day of March, 1928. Evidence having been adduced and the case having been argued by counsel and taken under advisement by the court, now on this 20th day of April, 1928, the court finds generally in favor of the plaintiff and against the defendants and,

It is, therefore, ordered, adjudged and decreed that the defendants H. J. McLaughlin, Secretary of the Department of Agriculture of the State of Nebraska, and Frank O'Connell, Chief Game Warden for the State of Nebraska, and each of them, their agents, servants and officers employed in said Department of Agriculture, or working in conjunction with said Department, are restrained and enjoined [fol. 16] until the States of Iowa and Nebraska concur in legislation affecting the Missouri River:

1. From taking, destroying or confiscating the fish nets, traps or seines used for taking fish in and from the Missouri River only.

2. From arresting or prosecuting persons for fishing in the Missouri River with nets, traps or seines or for the possession of fishing nets, traps or seines used or for use in the Missouri River only.

3. This injunction is in no wise intended to apply to fishing nets, traps or seines used in any other waters in the State of Nebraska than the Missouri River, or to prosecutions for the use of fishing nets, traps or seines in any other waters than the said Missouri River. Nor is it intended to apply to the mouths of streams flowing into said Missouri River; or to lakes, or lagoons along said river.

Exception noted to defendants and forty days allowed from the rising of the Court to prepare and file Bill of Exceptions. Each party to pay their own costs.

Dated at Lincoln, Nebraska, this 20th day of April, A. D. 1928.

By the Court:

Mason Wheeler, Judge.

[fol. 17] In District Court of Lancaster County

[Title omitted]

Notice of Appeal—Filed April 28, 1928

Come now the defendants in the above entitled cause, and hereby gives notice of appeal to the Supreme Court from the judgment rendered in the District Court, in said cause, on the 20th day of April, 1928.

Dated this 28th day of April, 1928.

H. J. McLaughlin and Frank O'Connell, Defendants, by Geo. W. Ayres, Their Attorney.

[File endorsement omitted.]

[fols. 18-21] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 22] In District Court of Lancaster County

Bill of Exceptions—Filed May 28, 1929

[Title omitted]

Motion for Order Settling Bill of Exceptions—Filed March 30, 1928

Came on for hearing before Honorable Mason Wheeler, Judge; and the plaintiff and the defendant each to main-

tain the issues on their respective parts, adduced testimony and offered evidence, and all of said evidence and testimony, all of the objections thereto, with the grounds therefor, all of the rulings of the court on such objections, together with all of the exceptions to such rulings made and taken at the time having been by the Defendants herein reduced to writing in this their Bill of Exceptions, and said Defendants having served the same upon the attorney for he Plaintiff for examination and amendment, as required by law, said Defendants now pray the court before whom said cause was tried that said Bill of Exceptions may be now settled, allowed, signed, sealed and made a part of the record in said cause in said court.

[fol. 23] AGREEMENT OF COUNSEL

It was admitted by each defendant in open court, and the suit was tried and decided on the theory that the law of the State of Iowa relating to fishing in the Missouri River with nets and seines is as alleged in plaintiff's petition.

[fol. 24] WILLIAM H. MILLER, JUNIOR, Plainiff, was duly sworn and testified in chief as follows:

Examination in chief by Mr. Smith:

Q. Give the reporter your full name?
A. William H. Miller, Junior.
Q. Where do you reside?
A. At Blair, Nebraska.
Q. That is in Washington County?
A. Yes, sir.
Q. How long have you resided there?
A. 40 years.
Q. Are you the plaintiff in this action?
A. I am.
Q. On or about July 23, 1927, did you own or possess certain nets, traps or seines used for the purpose of taking fish out of a river?
A. I did.

Q. You purchased them prior to that date did you?

A. Yes, sir.

Q. Have you at all times since that date had in your possession and owned nets, traps or seines?

A. Yes, sir.

Q. For what purpose so far as the place or use is concerned did you keep those—where do you use those nets?

A. In the Missouri River.

[fol. 25] Q. Do you possess them or own them for use in any other water except the Missouri River?

A. No, sir.

Q. Do you use them in any other water except the Missouri River?

A. No, sir, I have not.

Q. Do you know of your own knowledge whether or not there are others other than yourself who are similarly situated with regard to nets, traps and seines as you are according to your testimony?

A. I do.

Q. Have you an opinion as to the number of those people?

A. Well, I should say there is 400 or better.

Q. Do those parties have any kind of an organization through which they function?

A. We have.

Q. Just tell the court what the organization is?

A. The Missouri River Protective Association, we have got something over 500 members and we have an organization to protect our interests in fishing in the Missouri River.

Q. You are familiar to the questions involved in this action?

A. I am.

Q. You would give it as your opinion that they are questions of common and general interest?

[fol. 26] Mr. Ayres objects because the witness is incompetent and immaterial and nothing upon which expert testimony is required.

Overruled. Exception.

A. Yes, sir.

Q. Did you hear the questions involved in this case discussed frequently?

A. I did.

Q. Where did you hear them discussed just in regard to the locality?

A. In every place I have been, in fact the whole river country.

Q. Are these questions discussed at the meetings of your association that you testified existed?

A. Yes, sir.

Q. Have you for example ever had anybody from the State Game Warden's Department address you at these meetings?

A. We had a man that claimed that he was but I have since found out that he wasn't a warden at that time—Mr. Dailey.

Q. Have you made efforts as far as you were able to have the Game Wardens to address you?

A. We tried to get Mr. O'Connell at our last meeting but he said he was busy and couldn't come.

Q. Would it be practicable to bring all of the members who are interested in this question down to Lincoln before the court as plaintiffs in this case in your opinion?

A. I would hardly think so.

[fol. 27] Cross-examination by Mr. Ayres:

Q. You reside at Blair?

A. I do.

Q. You have had your nets, you had them before the law was amended?

A. I did, yes.

Q. Did you ever use those nets in seining for fish anywhere in the State of Nebraska other than the channel of the Missouri River?

A. No, sir.

Q. Prior to the change in the law you didn't use them for seining anywhere else?

A. No, sir.

Q. Now have you a license to fish in the State of Iowa?

A. No, sir.

Q. Do you use these nets that you have to fish on the Nebraska side of the Channel of the Missouri River?

A. Yes, I have fished on the Nebraska and the Iowa side both.

Q. You did fish on the Iowa side but have no license for fishing there and you never put up any bond to the State of Iowa did you?

Mr. Smith objects as incompetent, immaterial, irrelevant, not proper and not material what the law of Iowa is or the criminal law may be or what this resident of Nebraska may have done or a Nebraska Court may have [fol. 28] done or not done with reference to the law of Iowa.

Overruled. Exception.

A. No, sir.

Q. Now you say you have attended the meetings of this organization of those who own nets to use in the Missouri River?

A. Yes, sir.

Q. And nobody else?

A. Well, we are taking in other members, we have a great many sympathizers.

Q. You have?

A. We have.

Q. Those people you are selling fish to are sympathizers aren't they?

A. The whole farmers' country north of Blair have joined our organization all up and down the bottom.

Q. Do you want to indicate to us that all of these use nets?

A. I say 100 are social members.

Q. You said all of the country north of Blair belonged to your organization?

A. They do.

Q. You only have 400 members?

A. We have over 500.

Q. I thought you said 400?

A. 400 net members.

Q. This organization does not consist of the owners of the seines?

[fol. 29] A. Well, yes, it is the owners of seines too.

Q. And the other people?

A. And other people interested.

Q. Are you able to state what the object of that organization is?

A. Well, it is to better the fishing in the Missouri River.

Q. But it doesn't say it isn't one of their Articles that fishing only in the Missouri River will be better if they allow the fish to be seined out of the River?

A. We want to go into the Legislature of the State and stop the seining of over-flow waters.

Q. It is for the purpose of getting some legislation there regarding the seining of the over-flow waters of the Missouri River?

A. No, it is for fishing.

Q. It is a matter of fishing in the Missouri River otherwise than by seines?

A. Oh, yes.

Q. Don't you know that it is destructive to the fishing business and for the industry to have fish taken by a seine?

Mr. Smith objects as incompetent, immaterial, irrelevant, and not proper cross examination, and not within any of the issues raised in his direct examination.

Court:

Q. How long have you been fishing in the Missouri River?

A. About 12 years.

[fol. 30] Q. How extensively?

A. Well, it has just been the past two years that I have made a business of it, before that I was farming and I just fished as a pleasure.

Q. Has that been your entire business for the past two years?

A. Yes, sir.

Court: I think he is qualified almost as an expert fisherman and has peculiar knowledge about the conditions.

Overruled. Exception.

A. It certainly is taken out of a lake with a seine where the water has a chance to settle the mud, but the Missouri River has a solid bottom and you can seine in the river but to seine under the rule the State has been applying we are losing the fish.

Q. You would say personally that it is destructive for the protection of the fish to have the waters seined?

A. The inland waters I do. If they seined steady enough in the Missouri River it would apply but the Missouri River has a solider bottom.

Q. Wherever you seine and get the fish out of the River with a seine they are gone?

A. They are gone unless you throw the smaller ones back.

Q. Your purpose in seining is because it is more effective you can get more than with a hook and line?

A. Yes, our principle way of fishing is with trammel nets and hoop nets, there isn't many fishermen that are in favor [fol. 31] of the seine.

Q. And nets—a net is a seine?

A. A net isn't a seine.

Q. You said trammel nets?

A. They float down the river and the fish go in it too.

Q. Do you fish with seines?

A. Some, but there isn't much seining done in the Missouri River.

Q. Well, fishing with nets that is detrimental to the propogation of fish?

A. No not with the nets we use, we use a 2 by 2½ inch mesh which allows all the small fish to stay in the water.

Q. You are engaged in the business of fishing commercially?

A. I am.

Q. And are interested in getting as many fish as you can without much regard to the propogation and preservation of them?

Mr. Smith objects as not proper cross examination, argumentative and already gone over.

Overruled. Exception.

A. No, I am not we believe in the propagation of fish.

Q. And in the preservation of the fish?

A. Yes, we do.

Q. How many members of the organization you spoke of and to which you belong have nets or seines?

A. Well, I would say there was in the neighborhood of 400 and I am receiving more every day.

Q. You don't know how many of these have licenses to [fol. 32] use nets and seines do you?

Mr. Smith objects for the reason that there is no law on the statute books at this time requiring a license for the use of a net, either trammel or hoop net in the State of Nebraska, that law was expressly repealed by the Session of 1927 of the Legislature, and therefore it is immaterial.

(Question withdrawn.)

Q. Do you know how many of the persons of whom you speak had a license to use nets and seines prior to the change in the law which made it unlawful to use them?

Mr. Smith objects as not proper cross examination, incompetent, immaterial, irrelevant, and not tending to prove any issue in the case and an attempt to treat this as a criminal proceeding; this plaintiff is not on trial for violating the law, and it is wholly incompetent.

Overruled. Exception.

A. No, I really don't know how many had licenses this last year, I have never checked up on some of the later numbers of the boys.

Q. You had a license yourself last year?

A. It was taken out in my partner's name. It was J. S. Slatterwhite.

[fol. 33] Q. But you didn't have any license or any bond up this year?

A. No, I have a selling license for $2.00.

Q. But not a license to use a net or seine?

Mr. Smith objects as incompetent.

Overruled. Exception.

(Not answered.)

Court:

Q. You have about the same fishing equipment as the other fishermen have?

A. I have.

Q. What do you have in that way?

A. We have around 100 yards of trammel net and anywhere from 10 to 25 hoop nets; some of the boys have a seine but not all of them, I judge probably not one-third of them have seines, maybe not that many.

Q. Tell me what this trammel net is?

A. Well, it is a net that is hung on two lines with a fine mesh strung between these two lines, then there is some heavier walling on the outside with large square meshes an 8 or 10 or 12 inch wall we call that an outer wall, the fish

strikes the smaller mesh and shove it through and it goes into the other side into a pocket and you raise the fish out of that pocket.

Q. What is the value of a trammel net?

A. The average cost would be from $50 to $75.

Mr. Smith:

Q. That is for a 100 yard net?

A. Well, a 100 yard net would cost in the neighborhood [fol. 34] of $75 or $80. A 75 yard net would run from $50 to $75.

Q. What is a hoop net?

A. That is made out of what we call webbing or staging or twine like the common fish line net in squares of 1½ inches, I guess it runs all the way from 1 inch to 2 inch meshes made in nets anywhere from 8 to 12 feet long.

Q. What is a hoop net worth?

A. A hoop net is worth from $5.00 to $8.00 and up as high as $15.00. A 12 foot net will cost you from $15.00 to $17.00.

Q. What kind of fish do you get?

A. Mostly carp and buffalo.

Q. Don't you get any channel cat?

A. We get a few. I would like to make an explanation; fishing for cat fish isn't a paying proposition, only once in a while when you take them with a trammel net, but to go out and catch cat fish you have to buy cheese—you have to have a special bait for cat fish and it costs to- much, we can bait for carp and buffalo for less money, we get 10 cents a pound on the bank for buffalo the Jews come and buy these; we get 15 cents for our cat fish and we have to get 1,000 pounds of bait for what you would catch 100 fish.

Q. What do you do with the fish after you get them?

A. We have quite a market at our camps, where we catch more we haul them to the Omaha market and the Omaha merchants come and get them.

[fol. 35] Q. Some fishmonger comes and purchases them?

A. Yes, there is a ready sale of them I will tell you that.

Q. Do you fish all the year around?

A. Except when the River is frozen.

Q. How much can a man make fishing on the River?

A. Well, my partner and I during the month of March so far made $636.00 including the last two days in February.

Witness excused.
Plaintiff rests.
Defendants' case.

Mr. FRANK O'CONNELL, a witness on behalf of the defendants was duly sworn and testified as follows:

Examination in chief by Mr. Ayres:

Q. What official position, if any, do you hold with the State of Nebraska?

A. Chief of the Bureau of the Fish and Game Department of Agriculture of the State of Nebraska.

Q. As such officer have you attempted to enforce the provisions of the Nebraska law prohibiting the use of seines and net in the waters of the State?

A. I have.

[fol. 36] Q. How far do you go with the enforcement, just state to the court what you do in regard to it?

A. With last year—I can probably give a better answer from my experience of last year—in the Elkhorn River we took in 50 miles of the River and we took out 58 hoop nets and by taking them we took about 800 illegal devices for fishing.

Q. Now did you attempt at any time to prevent anybody from fishing with nets on the Iowa side of the channel of the Missouri River?

A. No.

Q. Your efforts are devoted exclusively to the waters of Nebraska?

A. Yes, sir.

Q. I will ask you to state to the court whether you have ever seized without a search warrant any seines or nets in any private dwelling or building?

A. No, not in any occupied dwelling, no sir.

Q. And if any party is arrested and a seine or net is taken in his possession do you destroy it?

A. No, not if we know whose it is, sometimes we pick up nets that we don't know the ownership of and we destroy them.

Q. Those are picked mainly where you find them in the waters?

A. Yes, along the banks and in the fields.

Q. Do you ever keep the nets in your possession?

A. For a while to allow the owners to come in and explain, if they are of any value we keep them.

[fol. 37] Q. Wherever they are of any particular value you keep them?

A. Yes, sir.

Q. Do you know how many people living in the territory where this League is organized who had licenses for the use of nets or seines during the last year that were permissible?

Mr. Smith objects as incompetent, immaterial, irrelevant and not tending to prove any issue in this case.

Court: I am interested to learn whether they are a bunch of illegal fishermen and a lawless outfit, or whether they are fishing as a business and complying with the statute as far as they know and can.

Overruled. Exception.

A. There were 168 licenses last year.

Q. And no licenses have been issued this year?

A. No sir.

Q. Is there anything else you can and would like to say to the court Mr. O'Connell in connection with this matter, if so you make *make* such a statement?

Mr. Smith: I object to any voluntary statement as improper.

Overruled. Exception.

A. Our Department is under great pressure for furnishing cat fish; we have over 150,000 anglers that are paying a [fol. 38] license. We have never been able to propagate cat fish at our hatcheries, they never have had any hatchery to our knowledge for channel cat fish and the big supply of cat fish for Nebraska comes from the over-flow waters of the Missouri River—in the lagoons along the River which

are filled up in the Spring by the floods and they spawn the next year and the larger fish go out and work up the tributaries into the waters; we have another big spawning bed in the western part of the state, in western Nebraska, those are the two big spawning beds. The revenue for commercial fishing was around $800.00 in 1927; it is costing the Department $5000.00 to $10000.00 a year to properly enforce the law in that River country all these little lagoons, many of them are contraversial, some of the fishermen claim they are part of the original River but we claim they are not.

Mr. Smith moved to strike out all of the statement of the witness as voluntary in its nature for the reason that it is incompetent, immaterial, irrelevant.

Overruled. Exception.

Q. Now are you able to state whether or not it is necessary to forbid the use of seines and nets in the waters of Nebraska in order to properly propagate cat fish?

[fol. 39] Mr. Smith objects as incompetent, immaterial, irrelevant, and not tending to prove any issue in the case.

Overruled. Exception.

A. Absolutely.

Cross-examination by Mr. Smith:

Q. How long have you been Chief Game Warden of Nebraska?

A. Since March, 1926.

Q. What was your business prior to that time?

A. Adjutant of the American Legion.

Q. Had you ever had any experience in the propagation of fish or connected with any Department prior to that time?

A. None whatever.

Q. Now you testified that you never seized a net in a private dwelling, did I understand you correctly, without a search warrant?

A. Never without a search warrant.

Q. Now you stated too that you had 168 net licenses last year, now can you name one who fished without a license last year who belongs to the organization of these plaintiffs?

[fol. 40] A. I don't know the membership?

Q. The fact of the matter is that there is no law now requiring a license to use a net or trap or seine anywhere in Nebraska is there?

A. No.

Q. Because the Legislature thought they wouldn't license them now?

A. No.

Q. You wouldn't attempt to say that because only 168 took out a license when it was required by the law that that means that because now there is something like 400 who are possessing and use nets and seines that they were using them last year when the license was required would you?

A. I don't know what answer you want made,—no.

Q. It isn't conclusive then that the difference between 168 and 400 that that number *d*ished illegally last year?

A. Not unless there has been a great change or demand for fishing—higher prices or something to interest so many.

Q. Isn't it true that some men might fish when a license was not required that wouldn't when they had to take out a license?

A. Yes.

Q. So then this isn't conclusive that there were unlawful violators?

A. No.

[fol. 41] Q. Now your Department does not prevent the sale of fish caught in another state here, does it?

A. No.

Q. There is no authority for that?

A. No, with one exception, black bass.

Q. Now there is nothing then that prevents a fisherman from Iowa selling his fish in Nebraska is there?

A. No.

Q. The Department is using nets in lakes in the state right now aren't they?

A. Only where the crop became so numerous it was necessary to take them, our policy is absolutely to discourage the use of seines.

Q. What is the state doing with the surplus of coarse fish?

A. We sell them.

Q. So the Department is not hostile to selling fish?

A. We are not allowed to sell cat fish, we just sell carp.

Q. You have qualified as an expert, there is a large fish-eating public in the State of Nebraska isn't there?

A. Yes.

Q. Isn't it true also that there is a large fish-eating element who are not fishermen—a good many that eat fish who don't actually fish for them?

A. Oh yes.

[fol. 42] Redirect examination by Mr. Ayres:

Q. Are you able to state from your observation and from the information that has been given you whether or not seines are used to take fish out of these bayous and inlets on the Missouri River on the Nebraska side?

A. Yes, there are.

Mr. Smith:

Q. By whom, the Department or by individuals?

A. Individuals other than the Department.

Mr. Ayres:

Q. Are you able to state whether such action as that is detrimental to the propagation of catfish and other game fish?

A. Absolutely.

Q. It is detrimental?

A. Not only that but on the market in the last few weeks in Omaha there have been thousands of undersized catfish on the market in Omaha.

Q. I believe you said there were about 150,000 licenses granted by the State?

A. 168,000 in 1927, it varies some.

Q. Do you know the attitude of the people holding these licenses generally towards the capture of fish by seines and nets by individuals?

Mr. Smith: Objects as immaterial, and not proper redirect examination.

Overruled. Exception.

[fol. 43] A. We have a great deal of trouble getting bonds from them so many refused to furnish surety bonds, they wanted to use the old bonds.

Q. What I was asking was whether or not the great body of these people who pay their money to hold a license to fish approve or disapprove of the taking of fish by nets and seines?

A. Do you mean the 150,000 anglers?

Q. Yes?

A. Yes, they do, absolutely.

Q. They do what?

A. Object to it.

Q. They want the fish protected?

A. Yes, sir.

Q. And don't want nets and seines used?

A. No, sir.

Q. The overwhelming majority are that way?

A. Yes, sir.

Q. Have you had letters coming to your office in regard to that matter?

A. Yes, sir, many of them lately.

Recross-examination by Mr. Smith:

Q. Criticizing the State somewhat for seining these lakes and selling the fish?

[fol. 44] A. We have occasional criticisms for that, but on the other hand there is a big demand for the removal of the carp because of the damage to the game fish.

Q. The carp damage the game fish in the Missouri River just as much as they would in the lakes?

A. No, the damage is different—very much different.

Q. Explain to us how it is different?

A. The place where the carp do the most damage is in the lakes and ponds, the tendency of the carp is to stir up the bottom and that is not done so much in running water and rivers.

Q. Where do these carp get into the lakes there?

A. Through the running water from the Missouri River that is the source; the carp were imported by the Federal Government.

Q. Isn't it true that every time the Missouri River overflows a large number of carp are put into these lakes along the river?

A. Yes they get everywhere.

Q. If they are taken from the Missouri River before it overflows there will be less of them for the State to seine out and sell?

A. Yes, but that isn't correct about less carp.

Q. How about the buffalo?

A. My opinion is that the buffalo is a very good fish but it won't bite on a hook, it is a fish that is soon going to be extinct.

Q. When you find a buffalo in one of these lakes what do you do with him?

A. We take him out.

[fol. 45] Q. You sell the buffalo with the carp?

A. Yes, sir.

Q. Suppose you find a catfish in one of these lakes what do you do with it?

A. We put him right back.

Q. The only difference between the State and these plaintiffs with nets and seines is the State is doing what these plaintiffs are asking to do lawfully, that is, the taking of a few catfish out of the Missouri River?

A. The good fish is the thing we are interested in.

Q. Would you be glad to have them take the carp and buffalo?

A. No, I don't think it is necessary out of the Missouri River.

Q. Wouldn't that make less work for the State when the River overflows, there will be fewer coming in for the State to seine out?

A. It might make a little difference but most of these are inland ponds where we have trouble with the carp, the State is only doing this for preservation purposes, is all.

Q. They don't attempt to make anything commercially?

A. No, they are losing money by it.

Court:

Q. Do the fishing activities of these plaintiffs in the Missouri River have any appreciable effect on the number and amount of fish in the River?

A. It wouldn't be possible to tell, the catfish are getting very scarce, I am in a position to say that one of the main reasons I know they are getting scarce—and maybe there

are a number of reasons—but they are getting scarce and [fol. 46] I am certain in my own mind that throughout the State generally the illegal device is the great thing that is cutting down on the catfish; we find many traps with skeletons of 25 nice catfish in, a man places it there and gets scared and leave it and we find many of them dead.

Recross-examination continued by Mr. Smith:

Q. You say the game fish are disappearing?

A. The catfish.

Q. Isn't one cause the prevalence of carp and buffalo, they prey on them don't they?

A. In a measure but nearly like they do on the Bass and other still water fish.

Q. When you are taking them from the lakes as a mere preservation measure you have in mind the preservation of the catfish with other fish?

A. Yes sir.

Witness excused.

[fol. 47] Defendants rest.

Plaintiff asks leave to withdraw rest and is given leave of court to do so.

Plaintiff's case in chief resumed.

Mr. William H. Miller, Jr., having been previously sworn herein was recalled in chief and testified as follows:

Examination in chief by Mr. Smith:

Q. Are you familiar with the by-laws of this organization?

A. I am.

Q. Do you have any by-laws regulating your membership as to the use of nets, traps and seines in the Missouri River?

A. We have.

Q. Now just tell the court what you have with reference to the use of nets, traps and seines?

A. Our by-laws say that any member caught using his nets, traps or seines, except in the waters proper of the [fol. 48] Missouri River will be expelled from our organization.

Court:

Q. Did you ever expel anybody for a violation of that by-law?

A. Well, we haven't had any violations, or any notice of any violations; we are watching them just as close as the Warden is.

Mr. Smith:

Q. Tell the court how old this organization is?

A. In February—about the first of February of this year.

Cross-examination by Mr. Ayres:

Q. Do any of the fishmongers or sellers of fish in Omaha belong to your organization?

A. There is one or two I think.

Q. No more than that?

A. No.

Q. You say it was organized in February of this year?

A. Yes, of this year.

Q. And it consists largely of people who hold nets, and seines both and there is a State Law against their keeping them for the purpose of fishing in the Missouri River, that is a fact, isn't it?

A. Yes, sir.

Q. And the penalty for their fishing anywhere else other than in the Missouri River is that of being expelled from [fol. 49] the organization is it?

A. Yes, sir.

Q. And you say you are watching them closely?

A. It is the business of the other members to keep tab.

Q. You wouldn't say whether the other members were going around to see that they did not fish anywhere else than in the Missouri River?

A. That is the agreement of our organization, each one keeps tab on the other.

Q. That is the only force you have, each member is told to watch the other and if he sees him seining in any inland lake or bayou to bring it up before the organization and expel him?

A. With due proof, yes.

Q. You haven't been in existence for two months?

A. Not quite.

Q. Yet you have regarded it essential and necessary to the public welfare to have a provision that a man shall be punished for seining anywhere else, that is true if they are members in your organization?

A. We understand that injunction allowed us to fish in the Missouri River and we were going to leave the State waters entirely alone.

Q. Why did you undertake to control it by penalizing your members from seining elsewhere?

A. We figured it would help our organization.

Q. You figured it would help you in this court by testifying to it?

A. Not when we done that, no.

Q. When you adopted that by-law you thought it was [fol. 50] necessary and you realized the fact that many of your members would have nets and seines?

A. Yes.

Q. And they might use them in waters just adjacent to the Missouri River on the Nebraska side, was that true?

A. Well in every business there is always members—you understand that some fellows want to sneak around and take a little advantage and we don't want those kind of fellows in our organization.

Q. You don't want them—your organization realizes that it is a bad thing to have fish taken out by private individuals with nets and seines anywhere else than in the Missouri River—you recognize that do you?

A. It is no more than for the State to do it, it is a bad policy to seine in that water.

Q. You would say it is a bad policy ordinarily to take fish with seines and nets from the waters of the State wouldn't you?

A. Any place that has a muddy bottom.

Q. The only exception you make is in the channel of the Missouri River?

A. Yes, sir.

Q. But most of you own nets and seines although the law makes it unlawful to own them?

A. That is true.

Q. And you do by by-law limit the use of them to the Missouri River?

A. Yes, sir.

[fol. 51] Q. And still you don't so limit it that they cannot go across on the Iowa side and violate the Iowa law?

A. The State of Nebraska is doing that.

Q. The law of Nebraska?

A. Absolutely, they have their nets down along the bank.

Q. I am asking about your organization now?

A. It is fishing in the Missouri River proper.

Q. It is no offense against the law of the organization to go on the Iowa side and fish without having a license and without putting up a bond is it?

A. Only in the Missouri River proper.

Q. But you do permit that in the Missouri River proper in your organization?

A. Yes, sir.

Witness excused.

[fol. 52] Plaintiff rests.

Defendant rests.

During the argument of counsel the reporter was recalled and Mr. Smith made the following request:

Mr. Smith: It having developed upon the argument that the State contends that paragraph one of its answer does not admit that the defendants are about to enforce the law of Nerbaska as it applies to the possession of nets, traps and seines for use in the Missouri River and said water only in the actual use of said nets, traps and seines therein, and plaintiff asks leave to withdraw his rest and adduce further evidence in support of the allegations of his petition in reference thereto.

Court: Leave granted.

Mr. FRANK O'CONNELL, having been previously sworn herein, was recalled in chief by the plaintiff and testified as follows:

[fol. 53] Examination in chief by Mr. Smith:

Q. Mr. O'Connell, you are familiar with the provisions of Section 10, Chapter 126, of the Session Laws of Nebraska for 1927 are you?

A. Yes, sir.

Q. And are you familiar with that provision that says: "The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps except as authorized by the Department of Agriculture shall be unlawful." Are you familiar with that?

A. I am.

Q. Are you also familiar wtih the provision that "No person shall take or attempt to take any fish except minnows from the waters within the State of Nebraska with nets, traps or seines?"

A. Yes, sir.

Q. Has your department formally formulated any policy since the enactment of this law with reference to its enforcement?

A. No definite policy.

Q. Your department has the enforcement of the Game Laws of Nebraska hasn't it?

A. Yes, sir.

Q. Have you at any time intended to enforce the provisions I have just read to you as against a party having in his possession a net, trap or seine used for fishing pur-

[fol. 54] poses in the Missouri River or the said water only?

A. Well, just what do you mean by possession?

Q. Just the mere possession of such, that is, if a man is found on the bank of the Platte River with a net in his hands would that be possession?

A. Yes, that would be possession, but the only thing I have cautioned my men about is construed as being not in use in the buildings of some one not engaged in fishing, that is our interpretation of possession.

Q. Suppose you drove into a farm yard and saw a fish net on the clothes line and the party owning the same told you he kept it to use in the Missouri River and had been using it or had before and intended to use it that day what would be your policy towards him under this law I have read?

A. We would watch him and when he went to use it we would arrest him.

Q. Suppose you actually saw him using it in the Missouri River on the Nebraska side of the middle thread of the River, what would be your policy towards him?

A. I would stop him,—oh, not in the Missouri River, I was thinking of the Platte River. No, we have no intention to enforce the law for fishing in the Missouri River.

Q. You will not enforce it against anyone fishing with nets, traps or seines in the Missouri River?

[fol. 55] Mr. Ayres objects as not a proper question, if the question should be raised and decided he might conclude to; it is only relevant thus far that he had never had that intention, and doesn't have that intention.

Overruled. Exception.

A. In the River proper, no.

Q. Suppose that the court should deny the relief asked by the plaintiffs in this case and dissolve the temporary injunction now in force, what would be your policy towards a man fishing in the Missouri River with a net, trap or seine on the Nebraska side of the thread of the River?

A. I can't make a positive statement at this time without going into the matter thoroughly.

Q. You wouldn't say you would not enforce it?

A. I wouldn't want to make that statement.

Q. Now Mr. Dubrey is a representative of your department?

A. Yes, sir.

Q. Where is he located?

A. At Omaha.

Q. Does he have any special territory?

A. Douglas county.

Q. How long has he been one of your deputies?

A. About a year.

Q. Does he have any orders except what he gets from your department?

A. That is all; he has had no orders on this matter.

No cross-examination.

Witness excused.

[fol. 56] ARGUMENT OF COUNSEL

Mr. Smith: The plaintiff now offers to prove, if permitted by the court so to do, by the plaintiff himself as a witness that about three weeks prior to the bringing of this action that he and those similarly situated were notified by one Dubrey referred to by Mr. O'Connell in his testimony in this case as being authorized by the department to enforce its laws and rules in Douglas County, Nebraska, and plaintiff offers to prove this at this time because of the construction of answer given by counsel for the State and referred to in the withdrawal of the rest next above stated.

Mr. Ayres objects for the reason that it has not been shown that Mr. Dubrey had any authority to speak, and the Commissioner of Game and Fish has been on the stand as a witness for the plaintiff and has testified clearly as to what the policy of the office was in that regard.

Sustained. Exception.

Plaintiffs rests.

Defendants rest.

[fol. 57] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—May 28, 1928

The Defendants herein having within the time heretofore allowed by the Court for that purpose, reduced to writing this proposed Bill of Exceptions, all of the evidence and testimony adduced or offered on the trial of

the above mentioned cause; all of the objections to the admission of said evidence and testimony, with the grounds therefor; all of the rulings of the Court on such objections, together with all of the exceptions to such rulings made and taken at the time, and having served the same upon the attorney for the Plaintiff for examination and amendment, as required by law, and the same being now here before me, the undersigned Judge before whom said cause was tried, on motion of the attorneys for the Defendants that the same may be settled, allowed, signed, sealed and made a part of the record in said cause in said Court.

Now, therefore, I do hereby certify that this Bill of Exceptions contains all of the evidence and testimony adduced or offered on the trial of said cause; all of the objections thereto, with the grounds therefor; all the rulings of the Court on such objections, together with all of the exceptions to such rulings made and taken at the time;

And I do hereby order that said Bill of Exceptions be now allowed; settled, signed, sealed and made a part of the record in said cause in said Court.

Done at Lincoln, Nebraska, this 28th day of May, A. D. 1928.

Mason Wheeler, District Judge.

[fols. 58-60½] Certificate to foregoing paper omitted in printing.

[fol. 61] Minute entry of argument and submission February 6, 1929, omitted in printing.

[fols. 62 & 63] In Supreme Court of Nebraska

[Title omitted]

Judgment—March 12, 1929

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof,

the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them, taxed at $—, and have and recover of and from appellee their costs so expended; that appellee pay all costs incurred herein by him, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Rose, J.

Day, J., took no part.

Charles A. Goss, Chief Justice.

[fol. 64] IN SUPREME COURT OF NEBRASKA

OPINION—Filed March 12, 1929

1. The admission of Nebraska into the Union established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of congress, or by the federal Constitution.

2. The eastern boundary of Nebraska is the middle of the channel of the Missouri river, 13 U. S. St. at Large, ch. 59, sec. 2, p. 47.

3. The acts of congress granting to Iowa and Nebraska concurrent jurisdiction "on" the Missouri river do not prevent Nebraska, without the concurrence of Iowa, from exercising criminal and civil jurisdiction west of the boundary line in the middle of the channel, nor prevent Nebraska from enacting and enforcing a law that forbids the use of fishing nets, traps and seines in that part of the river.

4. Treaty-making power has been committed to the federal government and not to individual states of the Union.

5. If Iowa and Nebraska with a common boundary line in the middle of the channel of the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by congress, the Missouri river is not for that reason a zone without police protection,

where the offenses known to the criminal law may be committed with impunity.

[fol. 65] 6. The sovereign power to define crimes and to authorize penalties therefor is inherent in state government.

7. The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty and may extend to the protection of fish in a river where the boundary line between two states is the middle of the channel.

8. To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

9. A valid exercise of police power may affect or destroy property values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. Mugler v. Kansas, 123 U. S. 623.

[fol. 66] Heard Before Goss, C. J.; Rose, Dean, Thompson, and Day, JJ.; Hastings and Redick, District Judges

Rose, J.:

This is a suit in equity for an injunction to prevent the secretary of the department of agriculture and the chief game warden of Nebraska from enforcing the legislative act containing the following provisions in so far as they relate to the waters of the Missouri river:

"No person shall take or attempt to take any fish except minnows from the waters within the state of Nebraska with nets, traps or seines. Carp, suckers, gars and buffalo fish may be taken with a spear during the months of March and November inclusive. The possession of any and all seines, except minnow seines, as provided in section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps, except as authorized by the department of agriculture, shall be unlawful." Laws 1927, ch. 126, sec. 10.

Plaintiff is a resident of Nebraska and owns valuable fishing nets, traps and seines. He insists that he uses them exclusively in taking fish from the Missouri river. His petition for an injunction contains pleas that the act of the Nebraska legislature is unconstitutional as applied to the Missouri river; that defendants are threatening to enforce it and to prevent plaintiff, by the use of his nets, traps and seines, from taking fish from the waters west of the middle of the channel; that congress granted to Iowa and Nebraska concurrent jurisdiction over the Missouri river; that Iowa permits fish to be taken therefrom in the manner forbidden by the act of the Nebraska legislature; that those states have not taken concurrent or united action making effective [fol. 67] their concurrent jurisdiction; that, in absence of such action or of an effective compact, Nebraska was without power to enact legislation preventing plaintiff from using his property to take fish from any part of the Missouri river; that the act, if enforced, will interfere with his personal and property rights and his lawful means of livelihood and result in the illegal confiscation of his nets, traps and seines in violation of the state and the federal Constitutions.

Defendants denied the invalidity of the legislative act and pleaded authority to enforce it.

Upon a trial of the cause the district court found the issues of law and fact in favor of plaintiff and granted his prayer for a permanent injunction. Defendants appealed.

The question presented by the appeal is the validity of the act as applied to Missouri river waters in Nebraska between the middle of the main channel and the Nebraska bank. The act applies alone to waters within the boundaries of Nebraska and defendants confine their jurisdiction thereto.

The admission of Nebraska into the Union on an equality with the original states established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of congress or by the federal Constitution. The eastern boundary of Nebraska is the "middle of the channel" of the Missouri river. 13 U. S. St. at Large, ch. 59, sec. 2, p. 47; Comp. St. Neb. 1922 p. 28. The western boundary of Iowa east of Nebraska is the same. An act of congress provides:

"The said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall [fol. 68] form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both." 5 U. S. St. at Large, ch. 48, sec. 3, p. 743; 9 U. S. St. at Large, ch. 82, p. 52.

The jurisdiction of Nebraska is not limited to the western bank of the river, unless the restriction is imposed by the words "shall have concurrent jurisdiction" as they appear in the provision quoted. The meaning of the expression has been the subject of judicial discussion and of some diversity of opinion. The better view seems to be that those words do not prevent one state from exercising generally civil and criminal jurisdiction over that part of the river within her own boundaries. The power to make treaties has been committed to the federal government and not to individual states. One state cannot require another to unite in treaties, laws, contracts or compacts. If Iowa and Nebraska with a common boundary in the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by congress, the river is not for that reason a zone without police protection, where the offenses known to criminal law may be committed with impunity. The exigency of preserving order along the border does not necessarily await the concurrent action of two states. Their interests may conflict and they may never agree. The concurrent jurisdiction authorized by congress is not "over" or "in" the river, but "on" the river. Each state, as to river waters within her own boundaries, has rights and powers not committed to the adjoining state. The Supreme Court of the United States once took occasion to say:

"To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the [fol. 69] river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state." Wedding v. Meyler, 192 U. S. 573, 585.

It is clear, therefore, that concurrent jurisdiction is not all-inclusive as applied to the Missouri River. The sover-

eign power to define crimes and to authorize penalties therefor is inherent in state government. The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty. Fisher v. Board of Regents, 108 Neb. 666; McFadden v. Denter, ante, p. —. The natural run of fish from the Missouri river into Nebraska rivers and creeks affects the food supply of the state. Concurrent jurisdiction of Nebraska and Iowa "on" the Missouri river does not prevent the legislature of Nebraska, without the consent of Iowa, from passing laws to prevent fishermen from interfering with the run of fish by stretching nets across Nebraska streams at confluences with the Missouri river. Protection of fish generally in waters within the boundaries of the state is equally clear. There is the highest authority for these views. On this subject the supreme court of the United States spoke as follows:

"The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. * * * And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact." Nicoulin v. O'Brien, 248 U. S. 113.

[fol. 70] Plaintiff's understanding of concurrent jurisdiction is also at variance with the following view:

"Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel." Nielsen v. Oregon, 212 U. S. 315.

To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by Congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

Cases in federal district and circuit courts, containing interpretations of concurrent jurisdiction at variance with rulings of the supreme court of the United States have been cited, but are of course not controlling.

Plaintiff insists that he owned and lawfully used his nets, traps and seines before the legislative act assailed was passed, and argues that they will be depreciated in value or destroyed without due process of law in violation of the Constitution, if the legislation is enforced. A valid exercise of police power may affect or destroy values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. Prohibition thus affected property in breweries, but the legislation on that subject was nevertheless sustained. Mugler v. Kansas, 123 U. S. 623.

[fol. 71] Invalidity of the legislative act in controversy has not been shown. The injunction granted by the district court is therefore reversed and the action dismissed.

Reversed and dismissed.

[fols. 72 & 72½] Petition for rehearing and brief, covering eight pages, filed April 17, omitted from this print. It was denied without more by order of April 27, 1929.

[fol. 73] In Supreme Court of Nebraska, January Term

[Title omitted]

Order Denying Rehearing—April 27, 1929

This cause coming on to be heard upon motion of appellee for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein denied.

Charles A. Goss, Chief Justice.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

FILED
JUL 26 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 261

WILLIAM MILLER, PETITIONER,

vs.

H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

A. HENRY WALTER,
Counsel for Petitioner.

(34,392)

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Brief in support of petition for certiorari	9

Table of Cases.

Deajeiro, Ex Parte, 152 Fed., 1004	10, 13
Mattson, In re, 69 Fed., 535	10, 13
Neilsen v. Oregon, 212 U. S., 315	5, 11, 15
Nicoulin v. O'Brien, 248 U. S., 113	13
Wedding v. Meyler, 192 U. S., 73	14

Table of Statutes.

5 Stat. at L., Ch. 48, p. 743	2
9 Stat. at L., Ch. 82, p. 52	2
Code of Iowa, Section 1747	2
Laws of Nebraska for 1927, Ch. 126, Section 10	3

SUPREME COURT OF THE UNITED STATES.

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H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William Miller, in support of this his petition for a *writ of certiorari* to be directed to the Supreme Court of the State of Nebraska to review a judgment rendered on the twelfth day of March, 1929, reversing the judgment of the District Court for Lancaster County of

the State of Nebraska in favor of the plaintiff, and the said Supreme Court of the State of Nebraska having entertained and denied his motion for rehearing on the 27th day of April, 1929, petitioner respectfully shows:

1. The States of Nebraska and Iowa are given concurrent jurisdiction over that part of the Missouri River which forms a common boundary between the two States by the following Act of Congress of March 3, 1845:

> "The said state of Iowa shall have concurrent jurisdiction on the river Mississippi and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both" (5 Stat. at L. Ch. 48, p. 743, amended as to boundaries by Act of Aug. 4, 1846, 9 Stat. at L. Ch. 82, p. 52).

The boundary line between the two states is the thread of the channel of the Missouri River (13 Stat. at L. 47).

2. The State of Iowa *permits, approves* and *licenses* the taking of fish from the Missouri River by means of nets, traps and seines. Section 1747 of the Code of Iowa provides as follows:

> "It shall be lawful for any person to take from the Mississippi or Missouri Rivers, within the jurisdiction of the state, any fish with nets

or seines upon procuring from the state game wardens an annual license for the use of such nets and seines."

3. In the year 1927, the Nebraska State Legislature enacted a law prohibiting the taking of fish by means of nets, traps or seines, as follows:

> "No person shall take or attempt to take any fish except minnows from the waters within the state of Nebraska with nets, traps or seines. * * * The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps, except as authorized by the Department of Agriculture, shall be unlawful" (Laws of Nebraska for 1927, Chap. 126, Sec. 10, pp. 343-4).

4. After the passage of the Nebraska statute above cited, the petitioner herein filed a petition in the District Court for Lancaster County, Nebraska, "on behalf of himself and all other persons similarly situated," alleging that:

> (*a*) He is a resident of the state of Nebraska.
>
> (*b*) He is the owner and is in possession of certain nets, traps and seines used for the purpose only of taking fish from the Missouri River and purchased prior to the passage of the Nebraska statute above referred to.
>
> (*c*) The law of Iowa permits the taking of fish from the Missouri River by means of nets, traps and seines.
>
> (*d*) Section 10 of Chapter 126 of the Laws of Nebraska, *supra,* is null, void and unconsti-

tutional in violation of Sections 3 and 21 of Article I and Section 14 of Article III of the Constitution of the State of Nebraska, and in violation of Section I of Article XIV, Sections 1 and 2 of Article IV and Section 8 of Article I of the Constitution of the United States.

(*e*) The defendants (respondents herein) are the persons charged with the enforcement of the said Nebraska law and are about to enforce the same to the damage of the plaintiff.

(*f*) Plaintiff is without an adequate remedy at law.

Wherefore plaintiff prayed that the defendants, and each of them, be restrained and enjoined from, in any manner, enforcing or attempting to enforce said Nebraska law over any part of the Missouri River proper.

5. By paragraph I of their joint answer, the defendants (respondents herein) admit the foregoing allegations of the plaintiff, except that said answer alleges that plaintiff has an adequate remedy at law and uses his nets elsewhere than in the Missouri River. The law of Iowa, as pleaded, is not admitted, but same was duly proved. Plaintiff, by way of reply, denied the new matter alleged in said answer.

6. The said District Court sustained the prayer of the plaintiff's petition, upon the ground that Congress, by the Act herein referred to, prevented Nebraska from enforcing her penal laws on the Missouri River unless same were concurred in by the state of Iowa.

7. Defendants appealed to the Supreme Court of the State of Nebraska and, after argument and hearing in said Court, the judgment of said District Court was reversed on or about March 12, 1929, the Supreme Court holding that the said Act of Congress did not prevent Nebraska from enacting and enforcing a law forbidding the taking of fish by means of nets, traps and seines from that part of the Missouri River flowing within the limits of Nebraska, regardless of the law of Iowa. Within the forty days allowed, by rule of said Supreme Court, for filing motion for rehearing, plaintiff duly lodged therein such motion, which was entertained and overruled on or about April 27, 1929.

8. Petitioner believes that the precise question passed upon by the Supreme Court of Nebraska has not heretofore been determined by the Supreme Court of the United States, although in closely analogous situations this Court has indicated its agreement with the interpretation by other Federal Courts of the words "concurrent jurisdiction" to mean that neither state shall enforce its prohibitory laws regarding the taking of fish from such waters until the other state concurs therein and agrees thereto, or unless similar prohibitory laws are likewise in force in the other jurisdiction (*Neilsen vs. Oregon*, 212 U. S. 315).

In the *Neilsen Case, supra,* this Court has pointed out the paucity of authorities on the various phases of concurrent jurisdiction. Due to the valuable fishing rights existing in the numerous common boundary streams of States of our Union and the general pro-

vision by the Congress of the United States for concurrent jurisdiction of the respective states on said common boundary streams, the matter here involved is one of public interest, and of great importance to many persons, and an interpretation by this Court of the word "concurrent" as thus used is most desirable and necessary in removing the existing uncertainty of its meaning.

WHEREFORE your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of Nebraska, commanding that Court to certify the cause to this Court for review and determination as provided by law, that the judgment of said Supreme Court of Nebraska may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as may be just and proper.

WILLIAM MILLER,
Petitioner,
By A. HENRY WALTER,
Attorney for Petitioner,
Washington, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

A. HENRY WALTER, being duly sworn, deposes and says:

That he is attorney for the petitioner herein;

That he has read the foregoing petition and knows the contents thereof, and that the facts therein stated

are true to the best of his knowledge, information and belief.

A. HENRY WALTER.

Sworn and subscribed to before me this 24th day of July, 1929.

[SEAL.] RUTH C. ROWE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 261

WILLIAM MILLER, PETITIONER,

vs.

H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Acts of Congress establishing the boundary line between Iowa and Nebraska as the middle of the channel of the Missouri River, and granting the two States concurrent jurisdiction on that river, prevent the State of Nebraska from prohibiting the taking of fish on the river in a manner sanctioned and licensed by the State of Iowa.

The facts are stated and the applicable statutes are set forth in the petition. The sole question involved

is whether in the absence of the assent of Iowa, and in the face of the *positive sanction* by the State of Iowa of the taking of fish, by nets and seines, from the Missouri River, over which both Iowa and Nebraska exercise concurrent jurisdiction, Nebraska may prohibit the taking of fish from those waters in such manner.

The United States Circuit Court of Oregon has answered the question in the negative. *Ex parte Desjeiro*, 152 Fed. 1004. The Supreme Court of Nebraska in the instant case has answered in the affirmative.

In re Mattson, 69 Fed. 535, dealt with the right of Oregon to punish under its penal statute an act committed on the Washington side of the Columbia River, over which river both Oregon and Washington exercised concurrent jurisdiction. A number of cases involving jurisdiction were discussed in the opinion. The Court held that:

> "The word concurrent, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia River, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

In the more recent case of *Ex parte Desjeiro, supra*, Desjeiro, an alien, had been committed under an Oregon statute prohibiting an alien taking salmon or sturgeon fish from the waters of the State. The complaint alleged the unlawful taking of fish from the *waters of Oregon*, to wit, the Columbia River.

In reversing the conviction, the Court said:

> "And the vital and pivotal question involved is whether the statute under which the petitioners were convicted is invalid and inoperative by reason of non-concurrence there by the Legislature of the state of Washington" (152 Fed. 1006).
>
> "The law, as appears from a reading of the act, was general in its operation, as it is here, and designed to apply alike in all parts of the state, and concurrently with Washington over the waters of the Columbia River. If the act was void as it respects a citizen of the state of Washington, being general, it is void as to every other citizen whether of the state of Washington or California, or elsewhere. It is the act of concurrence between the two states, in the exercise of legislative authority, that validates the act and gives it the force of law, and, unless there is a concurrence or assent by both states to the enactment, it cannot have that force * * *.
>
> "It is the offense of fishing without being a resident of the state; and, the state of Washington not having concurred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson Case" (152 Fed. 1007).

The case decided by this Court, most nearly in point is that of *Nielsen vs. Oregon,* 212 U. S. 315, in which it was held that the State of Oregon cannot, by virtue of its concurrent jurisdiction over the Columbia River, *make criminal* the operation of a purse net in that river

within the territorial limits of the State of Washington, under authority and license from that State. In that case the alleged offense was not *malum in se*, but was merely *malum prohibitum* by the law of Oregon. So it is in this case. The act made *malum prohibitum* by the law of Nebraska is sanctioned and licensed by the State of Iowa.

With reference to this point this Court said:

> "Where an act is *malum in se*, prohibited and punishable by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other * * *.
>
> The present case is not one of the prosecution for an offense *malum in se*, but for one simply *malum prohibitum* * * *.
>
> The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot."

While pointing out the necessity for confining itself to the decision of the precise question, the Court stated that:

> "Whether, if the act of the plaintiff in error had been done within the territorial limits of

> the state of Oregon, it would make any difference, we need not determine * * *. It is enough to decide, as we do, that for an act done within the territorial limits of the state of Washington, under authority and license from that state, one cannot be prosecuted and punished by the state of Oregon. There is little authority upon this precise question, but see *Re Mattson, U. S. Circuit Court for the District of Oregon,* 69 Fed. 535, and *Ex parte Desjeiro,* same court, 152 Fed. 1004."

The Supreme Court of Nebraska apparently relied on the case of *Nicoulin vs. O'Brien,* 248 U. S. 113, as applicable to the question here involved. But the facts are in no way analogous. In that case it was contended before this Court that by the provision of the Virginia Compact the *use and navigation* of the Ohio River should be free and common and that jurisdiction of Virginia and the proposed state (Indiana) should be concurrent. The territorial limits of Kentucky (as successor to the rights of Virginia) extend across the river to the low-water mark on the northerly shore. Before the Virginia Compact, Virginia had complete jurisdiction and property rights in and on the Ohio River. Virginia released only such portion of its rights as were *expressly conveyed* by the terms of the Compact. It seems obvious that in retaining the waters of the Ohio River within its boundaries, Virginia proposed to retain control and jurisdiction over all *property rights* in that river it had previously held, and that the grant of concurrent jurisdiction was not intended to, and did not, relinquish control over *property in the river.*

But in this case, Nebraska received only such rights in the Missouri River as were expressly granted by the Act of Congress. Those rights are expressed in the words "Concurrent jurisdiction" and are definitely limited to control or jurisdiction concurrent with Iowa. The reservation to the grantor of sole control for all purposes except "use and navigation," as in the *Nicoulin Case*, does not exist here for the reason that both Iowa and Nebraska have no rights in the Missouri River except such as were derived from a common source, and consequently neither State may claim a jurisdiction over any part of the river superior to the jurisdiction of the other.

That the distinction between "use and navigation" and the *ownership of property rights* in the river existing before, and continuing after, the Virginia Compact was the basis for this Court's decision is indicated by the following language:

> "And we think it clear that no limitation upon the power of that Commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."

In the *Nicoulin Case* the Court cited *Wedding vs. Meyler*, 192 U. S. 73, in which Justice Holmes adopted in the opinion the following statement respecting the concurrent jurisdiction of Kentucky and Indiana:

> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, there-

fore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky over so much of the Ohio River as flows between them."

In the *Nielsen Case, supra*, this Court states that:

> "Obviously, the grant of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented."

Such a question has arisen here and is of great importance to the people of the entire State of Nebraska. Moreover, because of the many similar situations existing with respect to streams forming a common boundary to many other States, it is believed that the question is one of *national* interest to which answer should be given by this Court.

Respectfully submitted,

A. HENRY WALTER,
Attorney for Petitioner,
701-4 *Smith Building,*
Washington, D. C.